Appendix

Order Due
November 18, 1966

In the Supreme Court
of the
State of California

In Bank

Brasch
vs.
The Superior Court of the City and County of San Francisco

ORDER DENYING HEARING
After Judgment by Court of Appeal
1st District, Division 3, Civil No. 24029

Petition for hearing DENIED.

Traynor
Chief Justice

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 22nd day of November, A.D. 1966.

William I. Sullivan, Clerk
By K. M. Hawkes, Deputy Clerk

Filed November 16, 1966,
William I. Sullivan, Clerk,
by J. M. R., S. F. Deputy.

CONSTITUTION OF THE UNITED STATES

Amendment XIV. Section 1. . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 473. (Pleadings may be amended: Continuance: Relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect: Correction of clerical mistakes in judgments or orders: Setting aside void judgment or order.) . . .

(Relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect.) The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken. . . .

§ 586. (Other defaults.) In the following cases the same *proceedings* must be had, and judgment must be rendered in the same manner, as if the defendant had failed to answer:

1. If the complaint has been amended, and the defendant fails to answer it, as amended, or demur thereto, or file a notice of motion to strike, of the character specified in Section 585, within 10 days after service thereof or within the time allowed by the court;

2. If the demurrer to the complaint is overruled and a motion to strike, of the character specified in Section 585, is denied, or where only one thereof is filed, if the demurrer is overruled or the motion to strike is denied, and the defendant fails to answer the complaint within the time allowed by the court; . . .

§ 585. (Default judgment.) Judgment may be had, if the defendant fails to answer the complaint, as follows:

1. In an action arising upon contract for the recovery of money or damages only, if the defendant has, or if more than one defendant, if any of said defendants have, been personally served and no answer or demurrer or notice of motion to strike (of the character hereinafter specified) or notice of motion to quash service of summons pursuant to Section 416.1 of this code or notice of the filing of a petition for writ of mandate as provided in Section 416.3 of this code has been filed with the clerk or judge of the court within the time specified in the summons, or such further time as may be allowed, the clerk, or the judge if there be no clerk, *upon application of the plaintiff,* and proof of such service of summons, must enter the default of the defendant or defendants, so served, and immediately there-

after enter judgment for the principal amount demanded in the complaint or a lesser amount if credit has been acknowledged, together with interest allowed by law or in accordance with the terms of the contract, and the costs against said defendant, or defendants, or against one or more of said defendants. If, by rule of court, a schedule of attorney fees to be allowed has been adopted, the clerk may include in the judgment an attorney fee in accordance with such schedule if the contract provides that an attorney fee be allowed in the event of an action thereon; provided, that plaintiff shall have the right, upon filing a written request at the time of application for entry of the default of the defendant or defendants, to have the attorney fee fixed by the court, whereupon, after the entry of said default, the court shall hear the application for determination of the attorney fee and render judgment for the same and for the other relief demanded in the complaint, or a lesser amount if credit has been acknowledged, and the costs against said defendant, or defendants, or against one or more of said defendants.

2. In other actions, if the defendant has been personally served and no answer or demurrer or notice of motion to strike (of the character hereinafter specified) or notice of motion to quash service of summons pursuant to Section 416.1 of this code or notice of the filing of a petition for writ of mandate as provided in Section 416.3 of this code has been filed with the clerk or judge of the court within the time specified in the summons, or such further time as may be allowed, the clerk, in courts having a clerk, *must enter* the default of the defendant; and thereafter the

plaintiff may apply to the court for the relief demanded in the complaint; in courts which have no clerk, the court must hear the evidence offered by the plaintiff, and must render judgment in his favor for such sum (not exceeding the amount stated in the complaint), as appears by such evidence to be just. If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account is involved, by a reference as above provided. (Emphasis added.) . . .

§ 1054. (Extension of time: By judge or by stipulation.) When an act to be done, as provided in this code, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of bills of exceptions, or of amendments thereto, or to the service of notices other than of appeal and of intention to move for a new trial, the time allowed therefor, unless otherwise expressly provided, may be extended, upon good cause shown, by the judge of the court in which the action is pending, or by the judge who presided at the trial of said action; but such extension so allowed shall not exceed thirty (30) days, without the consent of the adverse party.

In all cases in which the court or judge is authorized by this section to grant an extension of time, such extension of time shall be granted when all attorneys of record of parties who have appeared in the action agree in writing to such extension of time, and any extension of time previously granted by stipulation of all attorneys of record of parties who have appeared in the action shall not be included in the computation of the 30-day limitation upon extensions of time allowed by the court or judge.

Remainders, Inc. v. Superior Court, 192 C.A. 2d 411 at p. 412, 13 Cal. Rptr. 221:

(3) While a defendant has the right to be relieved of his default if he applies for such relief upon the grounds set forth in section 473, Code of Civil Procedure, the court cannot of its own motion grant a defendant relief from his default for failure to answer a complaint, as its jurisdiction so to do is dependent upon an application for such relief being made by the defendant and a showing made of mistake, inadvertence, surprise or excusable neglect. (*McDonald v. Severy,* 6 Cal. 2d 629 [59 P.2d 98]; *Osmont v. All Persons,* 165 Cal. 587, 590 [133 P. 480]; *Suttman v. Superior Court,* 174 Cal. 243 [162 P. 1032]; *Estate of Hultin,* 29 Cal.2d 825, 829-830 [178 P.2d 756].)